No. 4568

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GUISEPPI CAMPANELLI,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR,

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, First Division.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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STATEMENT OF THE CASE.

Plaintiff in error Guiseppi Campanelli and twenty-three others were charged jointly with conspiring to violate the Act of Congress of October 28, 1919, commonly known as "The National Prohibition Act". The indictment charged that the defendants did, at the Bay of San Francisco, during a period of time beginning on or about February 1, 1924, and continuing to on or about October 8, 1924, conspire and agree to sell, transport, import, deliver, furnish and possess intoxicating liquors for beverage purposes, to-wit: whiskey, wine, champagne, gin and beer, and to import and bring said intoxicating liquor into the

United States. The indictment further charges the following overt acts:

(a) That the defendants did at Havana, Cuba, during the month of July, 1924, cause the steamer "Giulia" to be loaded with about 12,000 cases of intoxicating liquor; that the said steamer "Giulia" left the port of Havana, Cuba, on or about the 7th day of July, 1924, and proceeded to a point about thirty miles from the Farallone Islands; that from that point defendants loaded a portion of said cargo of intoxicating liquors on to the motor boat "Nat" and other motor boats and transported the said liquors into San Francisco Bay;

(b) That the defendants on or about September 7, 1924, unloaded from the said steamer "Giulia" upon the motor boat "Shark" and the motor boat "Nat", about 3000 cases of intoxicating liquors and transported the same by means of the motor boat "Shark" and the motor boat "Nat" into San Francisco Bay;

(c) That the defendants between the 8th day of September, 1924, and the 8th day of October, 1924, unloaded from the steamer "Giulia" upon the motor boat "Shark" and the motor boat "Nat" about 3000 cases of intoxicating liquors, and transported the same by means of the motor boat "Shark" and the motor boat "Nat" into San Francisco Bay.

Fifteen of the defendants named in said indictment, including plaintiff in error, were brought to trial by said indictment on the 2nd day of March, 1925, before Honorable Robert S. Bean, United States District

Judge, presiding. The remaining nine defendants were not brought to trial.

From the evidence it appears that in the latter part of April, 1924, one of the defendants Guivan McMillan employed another of said defendants, John O'Hagan to command the steamer "Giulia", formerly the "Frontiresman", at that time lying in the Los Angeles drydock. O'Hagan took command of the vessel, and left Los Angeles on May 24, 1924, and proceeded to Panama City where a provisional Panamanian registry was procured, which registry showed Guivan McMillan to be the owner. The "Giulia" proceeded to Havana, Cuba, and was there loaded with 8418 packages of merchandise, consisting of whiskey, champagne, gin and other liquors. The defendant Daniel Henderson, accompanied by plaintiff in error, was present at Havana and superintended the loading of the vessel. The "Giulia" sailed from Havana on July 7, 1924, with Vancouver, B. C., as its destination. She proceeded through the Panama Canal to Mazatlan. The vessel encountered bad weather after leaving Mazatlan and the supply of coal became exhausted. Captain O'Hagan was compelled to run back under sail to Ensenada. While at Ensenada a cablegram was sent to McMillan in San Francisco and a short time thereafter plaintiff in error arrived at Ensenada in company with his cousin Ricardo Campanelli. Negotiations were made for a new supply of coal and the vessel proceeded to the Farallones. There is evidence tending to show that a quantity of liquor was unloaded on the "Nat" and one or two other boats, but

there is no evidence showing that any liquor was unloaded upon the "Shark"; that the "Shark" delivered coal to the "Giulia". Henderson accompanied by a woman known as Ruth Adelle Smith, also known as Patricia, came out to the "Giulia" on several occasions and remained there for sometime, Henderson taking charge of the unloading of the boat. Testimony shows that the conditions of the "Giulia" were very bad. The supply of provisions had run out, supply of coal had become exhausted, and there was no water, and finally the ship was abandoned on the 24th day of October, 1924, and she subsequently sank. The captain and the crew got in the life boats and were picked up by the steamer "Brookings", and were brought into San Francisco. The captain and crew were subsequently arrested and were formally charged with conspiracy to violate the "National Prohibition Act". After the sinking of the "Giulia", Henderson and McMillan disappeared and were never brought to trial. It appears that McMillan owed considerable money to the captain and the crew as wages. The defendant O'Hagan made a statement at that time. This statement was admitted in evidence as against the defendant O'Hagan only, and the jury were instructed that said statement was to be considered as evidence against Captain O'Hagan only, and not as against the other defendants. (Trans. pages 69-70.) A purported confession of plaintiff in error was admitted in evidence. (Trans. pages 148 to 153, which confession will be discussed later.)

At the conclusion of the trial the jury rendered their verdict, finding Guiseppi Campanelli, plaintiff in

error, guilty, and defendant John O'Hagan, guilty with leniency recommended, and all other defendants were found not guilty. Defendants Daniel Henderson, Guivan McMillan and Ruth Adelle Smith were not on trial. (Trans. pages 328-329.)

Thereafter, on March 10, 1925, the court rendered its judgment that the defendant John O'Hagan be imprisoned for the period of ten and one-half months in the county jail, at San Francisco, California, and plaintiff in error was ordered to be imprisoned for the period of two years in the United States penitentiary at Leavenworth, Kansas, and to be fined in the sum of $500.00. (Trans. pages 37-39.)

SPECIFICATION OF ERRORS.

The points relied upon by plaintiff in error for a reversal of the judgment rendered against him are as follows:

I.

That there is material variance between the indictment and the evidence introduced upon the trial of said case.

II.

That the court erred in admitting in evidence the testimony of George Michael MacNevin (Trans. pages 49-52), relating to the ownership of the ship "Ardenza" and to the "Black Book" of the defendant Henderson.

III.

That the court erred in admitting in evidence the testimony of Mrs. Juanita Benzel Cohen (Trans.

pages 52-54) with reference to the payment of a bill of the defendant Guivan McMillan to the King Coal Company.

IV.

That the court erred in admitting the testimony of G. L. Lee (Trans. pages 46-49) with reference to the seizing of liquor from the boat "Mae Heyman".

V.

That the court erred in admitting in evidence the Government's exhibit 9 (Trans. page 200), which refers to the King Coal Co. bill for delivery of coal to the "Mae Heyman".

VI.

That the court erred in admitting the testimony of Plinio Compana (Trans. pages 195-199) with reference to the bank account of plaintiff in error.

VII.

That the court erred in the admission in evidence of the papers taken from the possession of the defendant O'Hagan. (Trans. pages 199-200.)

VIII.

That the court erred in admitting in evidence a letter written in a foreign language and translated. (Trans. pages 112-117.)

IX.

That the court erred in admitting in evidence the unsigned statements of defendants Daniels and Rodney. (Trans. pages 90-98.)

X.

That the court erred in refusing to give the instruction upon circumstantial evidence requested by plaintiff in error. (Trans. page 317.)

XI.

That the court erred in refusing to give instructions No. XXII, XXIII (Trans. pages 319-320) requested by plaintiff in error, relating to the alleged confession of plaintiff in error.

ARGUMENT.

I.

THERE IS A MATERIAL VARIANCE BETWEEN THE INDICTMENT AND THE EVIDENCE INTRODUCED BY THE TRIAL.

Plaintiff in error contends that by reason of a material variance between the indictment and the proof in support thereof, the Honorable District Court had no jurisdiction to pass judgment upon plaintiff in error as stated in paragraph II of the motion in arrest of judgment. (Trans. page 34.) If any crime has been committed, it was shown to have been committed outside of the Northern District of California.

The indictment alleges that the conspiracy was formed on or about the 1st day of February, 1924, at the Bay of San Francisco. A careful reading of all the testimony in this case will convince this honorable court that the only evidence relating to any occurrence in San Francisco Bay, relative to the particular conspiracy set forth in the indictment was the arrest of

Captain O'Hagan and the crew of the "Giulia", upon their arrival in the Bay of San Francisco. (Trans. pages 236-237.)

> "Venue of the charge of conspiracy cannot be inferred from the fact that defendant was arrested by Police Officers of a certain City where the overt act is charged to have been committed, but is not shown to have been committed within such City."
>
> *Jianole v. United States,* 229 Fed. 496.

Merely because these defendants were arrested in the Bay of San Francisco does not prove in any manner that a conspiracy to transport liquors into the United States was formed at the Bay of San Francisco, where said conspiracy, if there was one, existed from the time the "Giulia" sailed from Los Angeles to Havana, Cuba, and continued up to the time of such arrest.

We are unable to ascertain from the evidence in this case when or where this alleged conspiracy was formed. According to defendant O'Hagan, his first connection therewith was in April 1924, at the office of Guivan McMillan, at No. 17 Columbus Avenue, San Francisco. (Trans. page 231.) According to the alleged confession of the plaintiff in error, it was formed about the time that he, Campanelli, went to Miami, Florida, in company with Henderson and De Maria, two of the defendants in this case.

The law requires that the conspiracy must be proved to have been formed at the place alleged in the indictment.

U. S. v. Cole, 153 Fed. 801, 808, citing
Hyde v. Slime, 199 U. S. 76, 77.

We earnestly contend that this variance calls for a reversal of the judgment in this case. The judgment of conviction upon the indictment in this case certainly would not be a bar to a prosecution of any of these defendants for conspiracy to transport intoxicating liquors into the United States, at Los Angeles or Havana, Cuba, or any other place.

II.

THE COURT ERRED IN ADMITTING EVIDENCE RELATING TO THE OWNERSHIP OF THE SHIP "ARDENZA" AND THE "BLACK BOOK" OF THE DEFENDANT HENDERSON UPON THE TRIAL OF THIS CASE.

The court admitted in evidence the testimony of the witness George Michael MacNevin (Trans. pages 49-52) to the effect that he was acquainted with the defendants McMillan and Henderson during the year 1923, and up to March, 1924. In a conversation at sometime during that period Henderson claimed that he owned a cargo of liquors, which was then aboard the ship "Ardenza", which was at that time outside the Heads at San Francisco. Also that Henderson was possessed of a "Black Book", which Henderson said represented so many thousand cases of whiskey, and he had it there as coal. (Trans. page 52.)

This testimony is clearly not within the scope of the indictment in this case. The indictment charges a conspiracy occurring between February and October, 1924, to transport liquors into the United States, and the overt acts therein charged all refer to the activities of the defendants with reference to the steamship "Giulia".

The identical point was decided in the case of *Terry v. United States,* 7 Fed. (2d) 28. This court reversed the judgment therein upon the ground that testimony relating to another conspiracy was inadmissible, upon a charge similar to the one now before the court. In that case the indictment charged that the defendants conspired and confederated to land a large quantity of intoxicating liquors at Allen's Wharf in Monterey County. At the trial the court admitted testimony over an objection and exception, tending to prove that about six weeks prior to the incident at Allen's Wharf, the plaintiff in error, employed one Frohn to transport several barrels of intoxicating liquor from Bodega Bay to a ranch house in the vicinity of Petaluma. There was no testimony of any kind, direct or circumstantial, tending to connect any of the other defendants with this prior incident. Said Mr. Circuit Judge Rudkin, in the case of *Terry v. U. S.,* supra:

> "In ruling upon the admission of testimony, and in the charge to the jury, the court proceeded upon the theory that some of the defendants might be convicted of one conspiracy and some of another; that is, that the plaintiff in error and the defendant Zuker might be convicted of a conspiracy to transport, possess, or sell intoxicating liquor at Bodega Bay, and the remaining defendants of a conspiracy to transport, possess, or sell intoxicating liquor at Allen's Wharf, even though the two conspiracies and the parties thereto were entirely different. The rulings admit of no other construction.
>
> 'If, however, the charge of conspiracy in the indictment is merely that all the defendants had a similar general purpose in view, and that each of four groups of persons were co-operating without

any privity each with the other, and not towards the same common end, but toward separate ends similar in character, such a combination would not constitute a single conspiracy, but several conspiracies, which not only could not be joined in one count, but not even in one indictment'. United States v. M'Connell, (D. C.) 285 F. 164.

In other words, a conspiracy is not an omnibus charge, under which you can prove anything and everything, and convict of the sins of a lifetime. For these reasons the rulings complained of are erroneous and call for a reversal."

Terry v. U. S., 7 Fed. (2d) 28.

And said Mr. Circuit Judge Hunt, speaking for the court in *Crowley v. United States,* 8 Fed. (2) 118:

"It is not doubted at all that in a conspiracy case where the evidence tends to prove that the defendant and one or more persons have entered into a common scheme to commit a crime such as unlawfully to transport liquor, evidence of other like offenses, committed by defendant in carrying on common enterprise, is relevant as showing the knowledge or intent of the defendant. But in order to make such evidence admissible, there must be such a showing of connection between the different transactions as raises a fair inference of a common motive in each. Griffs v. United States, 158 Fed. 572, 85 C. C. A. 596. Here there was no ground for any such inference. The obvious effect of the evidence was highly prejudicial and requires a reversal of the judgment."

Admission of testimony as to transactions occurring before the conspiracy charged ever existed is error.

Cooper v. United States, 9 Fed. (2d) 210.

"The scope and purpose of testimony of similar offenses is limited and only in exceptional cases, is such proof admissible. And, when admissible,

it must be clear and convincing, and not merely proof of suspicious circumstances."

Gart v. United States, 294 Fed. 66.

The argument used by this court in the *Terry* case is as strong an argument as can be found in favor of our contention on this point. We fail to see how the trial court could find any connection between the defendants on trial and the activities of McMillan and Henderson, two defendants not on trial, in connection with another conspiracy to transport intoxicating liquors into the United States by means of the ship "Ardenza". If this is proper testimony in this case, every transportation of liquor into the United States from the time of the passage of the "National Prohibition Act" in which any person charged in this indictment had any possible connection, would be relevant and material evidence. In view of the decisions quoted above, we believe the above named error alone is sufficient to call for a reversal of the judgment in this case, upon the authority of *Terry v. United States* (supra).

III.

THE COURT ERRED IN ADMITTING TESTIMONY RELATIVE TO THE SEIZURE OF INTOXICATING LIQUORS FROM THE BOAT "MAE HEYMAN" AND THE ADMISSION IN EVIDENCE OF THE PAYMENT OF A BILL OF THE KING COAL CO. FOR THE DELIVERY OF COAL TO SAID BOAT.

This point brings up a discussion of specifications of error III and IV and V of this brief. The witness G. L. Lee testified (Trans. pages 46-49) that on the

10th of April, 1924, that the boat "Mae Heyman" landed at Pier 16 in San Francisco, loaded with 1705 sacks, which contained bottles of beer; that he in company with other Federal Officers seized the boat and liquor and arrested the men in charge of the said boat. None of these men arrested were defendants in this case. The witness Mrs. Juanita Bunzell Cohen testified that she was employed by the King Coal Company, and on December 5, 1923, the defendant Guivan McMillan paid a bill for coal to the King Coal Company, amounting to over $300.00. (Trans. pages 52-54.)

Later the Government introduced in evidence the bill in question, for delivery of coal to the "Mae Heyman". (Trans. page 200.) What we have said with reference to the admission of the testimony relating to the "Ardenza" applies with even more force to the testimony now being discussed. In the case of *Terry v. United States,* hereinbefore quoted, the evidence declared by the court to have been erroneously admitted related to a different transaction, occurring at a different time and place by two of the defendants charged in the indictment under consideration. Here we have evidence of an arrest made of different defendants, at a different time, who were bringing in liquor upon another boat than that mentioned in the indictment in this case. The only possible connection with the "Mae Heyman" affair and the alleged conspiracy, for which plaintiff in error was convicted, is that one of the defendants, not on trial, paid a bill for coal delivered to this boat more than two months

prior to the date charged in this indictment, to-wit: December 5, 1923. (Trans. p. 53.)

This appears to us to be an attempt upon the part of the Government to charge plaintiff in error and his co-defendants, who stood trial in this case, with every transaction, and every crime, that Henderson and McMillan ever committed within the jurisdiction of the trial court. Conceding that a conspiracy to land intoxicating liquors in San Francisco from the steamer "Giulia" was proven, any act relating to said conspiracy committed by MacMillan or Henderson may be relevant and material, but we fail to see the relevancy or the materiality of testimony of acts of these two men relating to another transaction and another conspiracy not mentioned in the indictment in this case.

In the case of *Crowley v. United States,* 8 Fed. (2d) 118, it was held that evidence showing arrest of defendant on a charge of transporting liquor several months before, at a place eighty miles distant was inadmissible. The court in that case says:

> "It does not appear to have any relation whatever to the charge of conspiracy for which defendant and his co-defendants were on trial. It did not tend to show that he had acted in combination with anyone named in the conspiracy charged or that his possession of liquor at that time was part of a plan to violate the Prohibition Law at subsequent times, or that in any way it was connected with the offense under consideration. It was wholly collateral to the issue on trial as to place, time and circumstances and the evidence of it should not have been introduced."

If the defendants, McMillan or Henderson, or either of them, had been arrested for conspiracy with reference to the "Mae Heyman" affair, then such testimony would be irrelevant as far as the other defendants are concerned, even though the defendants McMillan and Henderson were personally present at the trial. The court in ruling upon the evidence relating to the purchase of the coal for the boat "Mae Heyman" (Trans. pages 139-140) stated that the evidence was competent as against McMillan and Henderson, but not as against the other defendants. McMillan and Henderson were not on trial. How could testimony, competent as to them only, be introduced in this case? We cannot help but feel that the introduction of this testimony, only relevant as against two absent defendants, was introduced for the purpose of prejudicing the jury against those defendants who actually stood trial.

Later, the court, upon motion of the United States Attorney, admitted this testimony as against all defendants. (Trans. page 200.) In doing so, the court committed the identical error which was expressly condemned in the cases of *United States v. Terry* and *United States v. Crowley,* already cited.

IV.

THE COURT ERRED IN ADMITTING TESTIMONY WITH REFERENCE TO THE BANK ACCOUNT OF PLAINTIFF IN ERROR.

The court, over the objection and exception of plaintiff in error, admitted the testimony of Plinio Com-

pana, who testified that he was manager of the Mercantile Trust Company, at its Broadway and Grant Avenue office, and that plaintiff in error had an account in said bank, commencing July 21, 1923, which showed deposits amounting to $157,611.02. The statement of this account was introduced in evidence. (Trans. pages 195-199.) The purpose of this testimony was evidently to show that plaintiff in error was engaged in illicit liquor transactions prior, during and subsequent to the times alleged in the indictment in this case. What we have said with reference to other offenses in reference to the "Ardenza" matter and the "Mae Heyman" affair apply also to this testimony.

> "Testimony to show or tending to show defendant's commission of crimes independent of that for which he is on trial is inadmissible."
>
> *Smith v. United States,* 10 Fed. (2d) 787.

> "Evidence of payment of money in April is inadmissible in a prosecution for a conspiracy ending in March, 1926."
>
> *Giordano v. United States,* 9 Fed. (2d) 830.

Generally evidence which shows, or tends to show, that the accused has committed another offense wholly independent of that for which he is being tried, even though it is a crime of the same character, is irrelevant and inadmissible.

Thompson v. United States, 283 Fed. 895,

Citing *Boyd v. United States,* 142 U. S. 450, and *Fish v. United States,* 215 Fed. 544.

In the case of *Heitman v. United States,* 5 Fed. (2d) 887, Mr. Circuit Judge Hunt, speaking for the court, says:

"The obvious purpose of the prosecution in introducing such evidence was to impress the jury with the belief that defendant, at some previous time, at another place, was implicated in an attempt to violate the prohibition law. The matter was wholly apart from the issue to be tried, and the tendency of it was to take the minds of the jurors away from the material questions before them, and to give the impression that defendant, by reason of previous criminal acts, was unworthy and therefore probably guilty of the charge upon which he was being tried. It was clear error to allow the evidence to go to the jury. Jianole v. United States (C. C. A.), 299, F. 496; Beyer v. United States, (C. C. A.) 282 F. 225; Souza v. United States, 5 F. (2d) 9, April 27, 1925."

It is further contended that the proper foundation was not laid for the admission of this account in evidence. It nowhere appears in the evidence of this witness (Trans. pages 195-199) that this account was authentic or correct.

Books of account will be rejected unless the requisite foundation in proof of their character, authenticity, correctness and regularity is laid for their introduction in evidence.

17 *Cyc.* 368.

V.

THE COURT ERRED IN THE ADMISSION IN EVIDENCE OF PAPERS TAKEN FROM THE POSSESSION OF DEFENDANT O'HAGAN.

At the time of the arrest of the defendant O'Hagan, the officers took from his possession certain papers, including the registry of the boat "Giulia" and other

papers which were introduced in evidence, and the jury were instructed by the court to consider them as evidence against the defendant O'Hagan only. (Trans. pages 199-200.) This brings us to the consideration of our Specifications of Error Nos. VII and VIII.

A letter written in Italian was found in the possession of the defendant O'Hagan. This letter was addressed to plaintiff in error; but was unsigned. The translation of this letter was read in evidence. (Trans. pages 112-117.) Subsequently this letter, with its translation, was withdrawn. (Trans. pages 200-201.) An account book, found in the possession of the defendant, O'Hagan, was also read to the jury. (Trans. pages 100-101.)

All these papers were evidently considered by the jury as evidence in this case as against all of the defendants, even though the court had limited the consideration of this testimony to only one of the defendants, and even though one of these papers was withdrawn from the consideration of the jury. It is difficult to erase the impression made upon the minds of the jury at the time of the introduction of these papers, and the reading of them to the jury, by a subsequent withdrawal of the same. The effect of this action of the Government and of the court is highly prejudicial to the rights of plaintiff in error inasmuch as the letter read was addressed to plaintiff in error and tends to show his connection with the steamship "Giulia" and her cargo, and his interest therein. (Trans. pages 112-117.)

Several of these papers were written or printed in a foreign language and were not translated. (Trans. pages 57-60.) We refer particularly to the manifest (Trans. pages 86-87) and the two documents introduced as U. S. Exhibit No. 3 (Trans. pages 57-59) which latter do not appear in the record but was referred to by the United States Attorney.

There can be no doubt that defendants were prejudiced by the admission of this evidence. They were not signed by any of the defendants. They were not translated and therefore should not have been allowed to be considered by the jury for any purpose.

VI.

THE COURT ERRED IN ADMITTING THE UNSIGNED STATEMENTS OF DEFENDANTS DANIELS AND RODNEY.

The statements made by the defendants Daniels and Rodney to the Federal Officers at the time of their arrest (Trans. pages 90-98) were admitted in evidence over the objection and exception of plaintiff in error. They were made after the conspiracy had ended, and were not declarations of co-conspirators by reason of the fact that these two defendants were acquitted by the verdict of the jury in this case. If they were acquitted they were not co-conspirators and these statements were hearsay, and consequently inadmissible. These statements connect plaintiff in error with the offense alleged in the indictment. The defendants who made these statements did not take the witness stand. Plaintiff in error had no opportunity

to cross-examine them. The statements were not made under oath and consequently were highly prejudicial to him.

VII.

THE COURT ERRED IN REFUSING TO GIVE REQUESTED INSTRUCTION UPON CIRCUMSTANTIAL EVIDENCE.

Plaintiff in error, requested the court to give an instruction upon circumstantial evidence. This instruction is designated as No. XVII. (Trans. page 317.) This instruction we believe correctly states the law upon this subject. The court in its own intruction (Trans. page 251) states "It is not necessary, however, for the Government to prove that such parties met together and entered into an explicit or formal agreement to that effect, or that they directly, by word or in writing, stated what the unlawful scheme was to be, or the details of the plan or means by which it is to be made effective." Further (Trans. page 252) the court says:

> "While the conspiracy may be proven by circumstantial evidence, yet the circumstances relied on for the proof must be such as to show that there was a common agreement or understanding, and the mere fact that two or more persons on different occasions did acts of similar nature, looking toward the same end, or result, would not constitute, as a matter of law, a conspiracy, unless there was a common design and intention."

These are the only instructions that we can find upon the subject. The instruction requested by plaintiff in error calls attention to the degree of proof required to

convict the accused, and states particularly, "The circumstances in the proof must be so strong as to exclude any other reasonable hypothesis except the single one of guilt."

In the case of *Terry v. United States,* 7 Fed. (2d) 28, this court held, that an instruction to the effect that if acts of the parties were committed in the manner or under circumstances which, by reason of their situation and conditions surrounding them, give rise to a reasonable and just inference that they were the result of a previous agreement, the jury could find the existence of a conspiracy to do those acts, was error in view of the presumption of innocence of the accused until proven guilty.

It is contended that if the giving of such an instruction constituted error, the failure of the court to give any instruction properly defining circumstantial evidence and the degree of proof required by such evidence, certainly constituted an error requiring a reversal of the judgment in this case.

VIII.

THE COURT ERRED IN REFUSING TO GIVE REQUESTED INSTRUCTIONS WITH REFERENCE TO THE ALLEGED CONFESSION OF PLAINTIFF IN ERROR.

In the testimony of Alf Oftedal, called as a witness for the Government, we find the written statement signed by plaintiff in error. (Trans. pages 148-153.) The witness further testifies that plaintiff in error made a second statement, which was reduced to writ-

ing, but which plaintiff in error refused to sign, but which was related by the witness to the jury, using the unsigned statement to refresh his memory. (Trans. pages 154-172.) Witness Oftedal testifies that these statements were made freely and voluntarily; that no threats, or promises or inducements of any kind were made. (Trans. pages 142, 146 and 173.) Upon cross-examination this witness testified that (Trans. page 146) before the first statement was made the bond of plaintiff in error had been fixed at $10,000.00; that the bond was subsequently reduced to $2500.00, which was furnished by plaintiff in error. He also testified that he had asked the witness Guido Braccini to locate plaintiff in error and bring him into his office. (Trans. page 165.)

Braccini testified (Trans. page 211) that after plaintiff in error visited the witness, at his own home, he, the witness, went to the office of Mr. Oftedal, and then afterwards brought plaintiff in error to the said office after first arranging with Mr. Oftedal for the reduction of the bail of plaintiff in error. (Trans. pages 212-213.) He further testified:

> "Mr. Oftedal agreed that he thought himself that Campanelli did not have the brains or finances to do anything like that, and told me that the Government looked favorably upon any minor defendant who would come and tell the whole truth, that generally in a case like that, where these minor defendants are of great help to the Government, generally the District Attorney's office is informed of the case, and the case is presented to the presiding Judge, but in any case the Judge is the one that has the final decision." (Trans. page 215.)

He further testified:

> "I said to Mr. Oftedal, 'Now, does this case look real bad?' And he did not answer anything, and I said, 'Now, this fellow, what shall I do with him? Do you want him to plead guilty, or has he got any line of defense?' Oftedal said he might plead guilty, and he might refer the matter to the District Attorney and the District Attorney might turn it over to the presiding Judge, or arrange leniency in his case, and then I suggested in that case probably, I said, he would come out with a fine, a nominal sum of money, probably $300, and Oftedal said nothing; I thought that was the silent understanding.
>
> Q. You conveyed that information, did you, Mr. Braccini, to Mr. Campanelli?
>
> A. On my own initiative I said to Campanelli, 'The best thing you can do it to plead guilty.' " (Trans. page 221.)

The testimony quoted is only a portion of the testimony which we believe tends to show that there existed in the mind of plaintiff in error a belief that if he would make statements with reference to the matters charged in the indictment in this case, that leniency would be shown him. Careful reading of the cross-examination of witness Oftedal and the entire testimony of witness Braccini show that the statements made by the plaintiff in error were not entirely free and voluntary.

Considering the relationship between the witness Braccini and Oftedal and between Braccini and plaintiff in error, the fact that the bail was actually reduced, the fact that the statements of Oftedal were repeated by Braccini to plaintiff in error, it is clear that there was a conflict in the evidence as to

whether or not the statements made by plaintiff in error were freely and voluntarily given.

Plaintiff in error requested the instructions Nos. XXII, XXIII, and XXIV to be given to the jury. These instructions are as follows:

> "XXII. I instruct you that you are the sole judge of whether any alleged statement made by the defendant Guiseppi Campanelli to Alf Oftedahl, or to any other Government agent, was made freely and voluntarily, and made without promise of immunity or other consideration, and made after he was fully advised of his rights, and made after he was warned that anything he might then say could later be used against him." (Trans. page 319.)

> "XXIII. In determining whether or not the statement of the defendant Guiseppe Campanelli was free and voluntary, you are entitled to take into consideration the fact that he was brought to the Government agents by a Government representative who afterwards promised him that if he would make a second statement the Government agents would see that he received only a fine and that when he refused to sign said second statement he was arrested late at night and placed under high bail although he was already under bond in this case." (Trans. page 319.)

> "XXIV. If you find from the evidence that any alleged statement made by the defendant Guiseppe Campanelli to Alf Oftedahl, or to any other Government agent, was not made freely and voluntarily, after the defendant was fully advised of his rights and warned that anything he might then say might later be used against him, and was not made without promise of immunity or other consideration, then I instruct you that you must disregard such statement." (Trans. page 320.)

"Where evidence is offered tending to show that a written confession was voluntarily made by accused, that it was reduced to writing in his presence and read and signed by him, such written confession is admissible in evidence, and the questions whether it was voluntarily made, when submitted by the court upon conflicting evidence, and whether it truthfully recites the statements made by the accused, and reduced to writing in his presence, are questions for the jury."

McBryde v. United States, 7 Fed. (2d) 466;
Wan v. United States, 45 Sup. Ct. Rep. 1;
McCool v. United States, 263 Fed. 55;
Murray v. United States, 288 Fed. 1008;
Shaw v. United States, 180 Fed. 348.

"Where there is a conflict of evidence as to whether a confession is or is not voluntary, if the court decides that it is admissible the question may be left to the jury with the direction that they should reject the confession if upon the whole evidence they are satisfied it was not the voluntary act of the defendant. In such circumstances the defendant would have no cause for complaint since the confession would be rejected if the jury disagreed with the court, defendant would be in no worse position than if no submission had been made."

Perrygo v. United States, 2 Fed. (2d) 181.

"In the Federal Courts, the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat. A confession is voluntary in law if, and only if, it was in fact voluntarily made."

Wan v. United States, 266 U. S. 1.

From the foregoing authorities, we conclude that where there is conflict in the evidence as to the voluntariness of the alleged confession, the jury are the exclusive judges as to whether or not the statement made was voluntary, or not voluntary, and it is the duty of the court to instruct them that they should disregard such alleged confession if they find as a fact that it was not voluntarily made.

Considering the circumstances surrounding the making of the alleged statements by plaintiff in error, he certainly had the right to have the jury instructed particularly upon the matters pointed out in his requested instructions and not be bound by one instruction covering all statements made by all defendants.

We believe that plaintiff in error was entitled to have the above instructions given.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the said plaintiff in error did not have a fair trial and was not legally convicted, and that the judgment of conviction in said United States District Court should be reversed.

Dated, San Francisco,
May 22, 1926.

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